

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



February 25, 2002

Mr. Craig Smith  
Director, Legal Services  
Texas Workers' Compensation Commission  
4000 South IH-35, MS-4D  
Austin, Texas 78704

OR2002-0898

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158997.

The Texas Workers' Compensation Commission (the "commission") received a request for eight categories of information regarding a proposed rule. You state that you will release some of the requested information to the requestor. You state, however, that you do not have any information responsive to categories 1, 2, 4, and 7 of the request.<sup>1</sup> You also claim that the submitted information is excepted from disclosure under sections 552.024, 552.107, 552.111, 552.130, and 552.136 of the Government Code. You state that you have notified Intracorp, a third party whose proprietary interests have been implicated by the request, of the request for information. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the commission has previously sought a decision from this office with respect to some of the submitted information. In Open Records Letter No. 2002-0438 (2002), we concluded that the commission could withhold some of the information submitted in Attachment D under section 552.111. We also concluded that the commission was

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<sup>1</sup>We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

required to withhold certain e-mail addresses from some of the documents submitted in Attachment G under section 552.137 of the Government Code, but that the e-mail address of a county employee could not be withheld under section 552.137. Further, we concluded that the commission could not withhold some of the documents submitted in Attachment F under section 552.110(a). Therefore, as the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, the commission must withhold or release the information previously submitted to this office, which we have marked, in accordance with Open Records Letter No. 2002-0438 (2002).

We will now address your arguments with respect to the remaining information. You contend that portions of the information in Attachment C must be withheld under section 552.024 of the Government Code. In actuality, it is section 552.117 of the Government Code that excepts from disclosure the home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential in accordance with section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The commission must withhold this type of information pursuant to section 552.117 only to the extent that the respective employee elected to keep this information confidential prior to the commission's receipt of the current records request.

The commission has submitted copies of the forms on which the employees whose information is at issue here have elected to keep certain personal information confidential. Four of the six employees have elected to keep their home addresses, home telephone numbers, social security numbers, and family member information confidential. However, the other two employees elected only to keep their home addresses and home telephone numbers confidential. They did not elect to keep their social security numbers or family member information confidential. Therefore, the commission may not withhold the social security numbers or family member information for these two employees under section 552.117. We have marked the information in Attachment C that must be withheld under section 552.117.

We note that these two employees' social security numbers may nevertheless be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).<sup>2</sup> *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any

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<sup>2</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Thus, the commission must withhold the driver's license information we have marked in Attachment C from public disclosure pursuant to section 552.130.

Next, you argue that Attachment D contains information that is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1993). We have marked the information in Attachment D that the commission may withhold under section 552.111.

You contend that the information in Attachment E may be withheld under section 552.107 of the Government Code and as work product under section 552.111 of the Government Code. Section 552.107(1) of the Government Code excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office has determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) was found to protect

only the attorney's communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. Moreover, section 552.107(1) does not except purely factual information from disclosure. *Id.* We determine the applicability of section 552.107(1) on a case-by-case basis. You do not indicate which individuals involved in the communications at issue in Attachment E are attorneys. Nor are we able to determine from the documents which individuals involved in these communications are attorneys, with one exception. Therefore, we are unable to conclude that much of the information in Attachment E is excepted under section 552.107. We have been able to determine that some of the e-mail communications in Attachment E were transmitted to Craig Smith, a commission attorney. Thus, we have marked the information in Attachment E that may be withheld under section 552.107.

A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). As you have not indicated and we are unable to determine which individuals are attorneys, we are unable to conclude that any of the remaining information in Attachment E contains the mental processes, conclusions, or legal theories of an attorney. Therefore, the remaining information in Attachment E is not protected by section 552.111 and the work product privilege. As you raise no other exception to the disclosure of the information in Attachment E, the commission must release the remaining information in Attachment E to the requestor.

The commission takes no position as to whether any of the information still at issue in Attachment F is excepted from public disclosure. The commission believes, however, that Intracorp may have a proprietary interest in some of that information. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received from Intracorp arguments for withholding the remaining information in Attachment F. We thus have no basis for concluding that the remaining information in Attachment F must be withheld from disclosure. *See* Open Records Decision Nos. 552 at 5 (1990) (stating that if governmental body takes no position, attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Therefore, the department must release the remaining information in Attachment F.

We note that some of the materials in Attachment F are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Finally, we address the e-mail addresses in Attachment G that were not previously addressed in Open Records Letter No. 2002-0438 (2002). Section 552.137 of the Government Code requires the commission to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no indication that the members of the public whose e-mail addresses are at issue here have consented to the release of their e-mail addresses, the commission must withhold the e-mail addresses still at issue in Attachment G that you have marked under section 552.137 of the Government Code. Further, we have marked two e-mail addresses in Attachment F that must also be withheld under section 552.137.

To summarize: (1) we have marked the information in Attachments D, F, and G that was previously addressed by this office and must be released or withheld in accordance with Open Records Letter No. 2002-0438 (2002); (2) we have marked the information in Attachment C that must be withheld under section 552.117; (3) the remaining social security numbers in Attachment C may be confidential under federal law; (4) we have marked the information in Attachment C that must be withheld under section 552.130; (5) we have marked the information in Attachment D that may be withheld under section 552.111; (6) we have marked the information in Attachment E that may be withheld under section 552.107; (7) the commission must withhold the remaining e-mail addresses still at issue in Attachment G that you have marked under section 552.137; (8) we have marked two e-mail addresses in Attachment F that must also be withheld under section 552.137; (9) the remaining information must be released; and (10) while the commission must allow inspection of copyrighted information not otherwise excepted from disclosure, the commission need not furnish copies of such information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 158997

Enc: Submitted documents

c: C. M. Schade, M.D., Ph.D.  
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(w/o enclosures)

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1601 Chestnut Street, TLP-11B  
Philadelphia, PA 19192  
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CAUSE NO. GN200798

TEXAS WORKER'S COMPENSATION  
COMMISSION,  
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL  
OF THE STATE OF TEXAS,  
Defendant.

§ IN THE DISTRICT COURT OF  
§  
§  
§  
§ TRAVIS COUNTY, TEXAS  
§  
§  
§  
§ 353<sup>TH</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff, the Texas Worker's Compensation Commission, and Defendant, Greg Abbott, Attorney General of Texas, announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. In compliance with the Tex. Gov't Code § 552.325(c), the requestor was sent reasonable notice of this setting and of the parties' agreement that Plaintiff may withhold the information at issue. The requestor was also informed of his right to intervene in the suit to contest the withholding of this information. The requestor initially intervened, but filed a notice of nonsuit and is no longer contesting the withholding of the information at issue. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, the e-mails that the Attorney General had originally determined to be subject to release is excepted from public disclosure by Tex. Gov't Code

*Yvonne Rodriguez-Henriquez*  
DISTRICT CLERK  
TRAVIS COUNTY, TEXAS

§ 552.107(1);

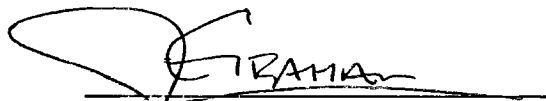
2. The TWCC may withhold from the requestors the information at issue;
3. All costs of court are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and


Defendant and is a final judgment.

SIGNED this the 11 day of March, 200<sup>4</sup>.

  
PRESIDING JUDGE

APPROVED:

  
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